APPENDIX.

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 13611 September Term, 1962 September Session, 1962

THEODORE J. MAYER,
Plaintiff-Appellant,

vs.

FRANK PETZELT,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

December 28, 1962

Before HASTINGS, *Chief Judge*, DUFFY and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is an appeal by plaintiff following the second trial of a diversity personal injury action against a Crystal Lake, Illinois, policeman. The first trial resulted in a $25,000 verdict for plaintiff, but a new trial was granted defendant. At the second trial on liability alone, the jury returned a general verdict for plaintiff with a special interrogatory against him on the question of due care. The District Court, notwithstanding the verdict for plaintiff, entered judgment[1] for defendant.

[1] Rule 50(b), FEDERAL RULES OF CIVIL PROCEDURE

Opinion of the United States Court of Appeals

While driving at night in Crystal Lake, plaintiff violated a traffic law. He then drove into a dark alley behind his hotel, and defendant followed on his police department motorcycle. While defendant was attempting to arrest plaintiff, the latter ran, fell in the alley, and was injured.

The vital issue is whether the alleged negligence of the defendant Crystal Lake policeman is actionable in Illinois.

We think the defendant, under Illinois law, can be held liable. And the District Court, sitting as "only another" Illinois court, *Allstate Insurance Co.* v. *Charneski*, 286 F. 2d 238, 244 (7th Cir. 1960) in this diversity case, erred if it rested its decision upon the ground that defendant's negligence was not actionable.

Illinois courts hold individual policemen liable for wrongs committed in performance of their official duty.[2] *Hood* v. *Brinson*, 30 Ill. App. 2d 498, 175 N. E. 2d 300 (1961), *La Cerra* v. *Woodrich*, 321 Ill. App. 107, 52 N. E. 2d 461 (1943), *Styblo* v. *McNeil*, 317 Ill. App. 316, 45 N. E. 2d 1011 (1943), *Wisher* v. *City of Centralia*, 273 Ill. App. 168, 176-77 (1933), *City of Chicago* v. *Williams*, 182 Ill. 135, 137, 55 N. E. 123, 124 (1899), *Board of Trustees* v. *Schroeder*, 58 Ill. 353, 355 (1871). In 1955 the rule was specifically recognized by the Illinois Supreme Court in *Gaca* v. *City of Chicago*, 411 Ill. 146, 155, 103 N. E. 2d

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[2] See 8 ILLINOIS LAW & PRACTICE 683-85.

[3] "It [the statute requiring municipalities to indemnify policemen for tort judgments rendered against them] does not change the general tort liability of a policeman." 411 Ill. 146, at 155; 103 N. E. 2d 617, at 623.

617, 623 (1952), and is expressed in Judge Schaefer's dissent in that case.[4]

An exception to the rule was announced, without authority, in *Taylor* v. *City of Berwyn*, 372 Ill. 124, 22 N. E. 2d 930 (1939), on which defendant mainly relies. However, subsequent legislation and the cases cited show that *Taylor* is not the law of Illinois.[5] Moreover, since 1945, the Illinois General Assembly has consistently presupposed the general tort liability of policemen, in providing that certain municipalities must *indemnify* policemen for tort judgments rendered against them.[6]

The District Court erred also if it found that the evidence failed to establish liability.

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[4] "The policeman, however, has been individually liable for his tort, notwithstanding he commits it while engaged in the performance of a governmental function." 411 Ill. 146, at 159; 103 N. E. 2d 617, at 625.

[5] In 1943, the Illinois General Assembly enacted §1-15 of the Cities & Villages Act, Chapter 24, ILLINOIS REVISED STATUTES. That Act, applicable in effect only to Chicago, by rendering the municipality "only" liable, implicitly excluded policemen from liability for negligence in driving motor vehicles in performance of their duties. By inference, it gave statutory force to the rule expressed in *Taylor*. In 1945, however, the legislature amended §1-15 by cutting out the qualification municipality "only" and provided that municipalities of over 500,000 population should indemnify policemen for *any* judgment rendered against *him* as a result of injury inflicted in performance of duty, excepting wilful misconduct. In 1957, the General Assembly broadened the indemnification statute, by the addition of a section, to cover all municipalities.

[6] 1961 ILLINOIS REVISED STATUTES §§1-4-5, 1-4-6.

Opinion of the United States Court of Appeals

The most favorable view of the evidence[3] for plaintiff is: On the night of his injury, plaintiff had illegally crossed the center line in making a wide right turn. Afterward he drove into the dark alley behind his hotel, parked and turned out the car lights. He then recognized, standing by his car, defendant, who had, about a month before, pursued plaintiff for "telling a lie," caught him and dragged him back to the police station ripping his shirt off in the process.[4] Defendant, then a man of 27 who weighed 190 pounds, said to plaintiff, a man of 64, "You ...., now I got you where I want you, and you come out of that car and you are going to get it." Defendant did not have his flashlight or ticket book with him at the time. While "hollering" and shaking plaintiff's car, defendant tried to open the locked doors. When defendant went to the right side, plaintiff got out the left, ran down the alley and was injured. Defendant later told a fellow officer that he "• • • must have scared hell out of him because he started to run from me."

We think the jury could on this evidence draw a reasonable inference that defendant should have foreseen, as a reasonably prudent man, that his conduct on the night in question, in view of the incident the previous month, would

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[3] 5 MOORE, FEDERAL PRACTICE, 2346-47 (2d ed. 1951).

[4] The evidence of the prior incident was excluded at the trial. We think the ruling was erroneous because it has a bearing on plaintiff's mental state on the night of June 23. *Smith* v. *Cornell*, 59 Ill. 66 (1871), *Jennings* v. *Murphy*, 194 F. 2d 35, 37 (7th Cir. 1952), 2 JONES, EVIDENCE, 1149 (2d ed. 1926), 18 ILLINOIS LAW & PRACTICE, 193-94.

probably cause plaintiff, in fear for his safety, to leave the automobile, run away in the dark alley and be injured while running. This inference would support the finding of negligence. *Karas* v. *Snell*, 11 Ill. 2d 233, 142 N. E. 2d 46, 56 (1957), *Hood* v. *Brinson*, 30 Ill. App. 2d 498, 175 N. E. 2d 390 (1961).

We need not refer to the cases cited by defendant with respect to liability for negligence causing mental suffering unaccompanied by physical injury. The recovery at bar was not sought for plaintiff's fear, but for a broken leg. And *Braun* v. *Craviu*, 175 Ill. 401, 420, 51 N. E. 657, 661-2 (1898) has no force after *Knierim* v. *Izzo*, 22 Ill. 2d 73, 174 N. E. 2d 157 (1961). In our opinion, an Illinois court would decide, as we do, that the jury could reasonably conclude that defendant's negligence was the proximate cause of plaintiff's injury and that defendant is liable. *Elgin, A. & S. Traction Co.* v. *Wilson*, 217 Ill. 47, 55, 75 N. E. 436, 439 (1905), *Brouchack* v. *Frailey*, 78 Ill. App. 262 (1898).*

Implicit in the general verdict for plaintiff is a finding of absence of contributory negligence. *Theurer* v. *Holland Furnace Co.*, 124 F. 2d 494, 497 (10th Cir. 1941). But a special interrogatory answered in the negative the question: "Did the plaintiff use ordinary care and caution for his own safety on the occasion in question?" This interrogatory is not inconsistent with the general verdict because, even though the jury might believe plaintiff was

* See, in general, 15 Illinois Law & Practice 489, Prosser, Torts 178-80 (1955 ed.); 29 Chicago-Kent Law Review 189 (1951), 48 Northwestern U. Law Review 377 (1954).

guilty of lack of due care, it might also believe that plaintiff's actions were not the proximate cause of his injury.[10] Furthermore, the District Court would not be justified in deciding that plaintiff's conduct proximately caused the injury, and entering judgment on the interrogatory. The jury had a right to consider the circumstances under which plaintiff acted, and could find that he fled in fear with no free opportunity to choose his precise path of escape. *Hackett* v. *Chicago Indianapolis & Louisville Railway*, 170 Ill. App. 140, 148 (1912), *affirmed*, 228 U.S. 559 (1913).[11]

We hold that the District Court erred in entering judgment notwithstanding the verdict. Plaintiff seeks reversal of the order which granted a second trial. We have considered the order, but we are not disposed, on the grounds asserted, to speculate upon the propriety of the District

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[10] "It is plain that the general verdict must yield when it is so clearly at variance with one or more of the [special interrogatory] answers that the two are irreconcilable in a legal sense. But every reasonable intendment in favor of the general verdict should be indulged in an effort to harmonize the two. The answers override the general verdict and warrant the entry of judgment in disregard of the latter only where the conflict on a material question is beyond reconciliation on any reasonable theory consistent with the evidence and its fair inferences." *Thearer* v. *Holland Furnace Co.*, 124 F. 2d 494, 498 (10th Cir. 1941).

[11] "A person confronted with a sudden or imminent peril is not required by law to do any particular thing, or to omit to do any particular thing, for his own safety. An act done under such circumstances may not constitute contributory negligence * * *." 28 ILLINOIS LAW & PRACTICE 123.

Court's exercise of discretion. For the reasons given, the judgment is REVERSED, and the cause is REMANDED for trial upon the issue of damages only.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Order of the United States Court of Appeals

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago 10, Illinois

Friday, December 28, 1962

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

No. 13611

THEODORE J. MAYER,
Plaintiff-Appellant,

vs.

FRANK PETZELT,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and it is hereby, Remanded to the said District Court for trial upon the issue of damages only, in accordance with the opinion of this Court filed this day.

Order of the United States Court of Appeals

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago 10, Illinois

Wednesday, January 30, 1963

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

No. 13611

THEODORE J. MAYER,
Plaintiff-Appellant,

vs.

FRANK PETZELT,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

Order of the United States District Court

In The
UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

THEODORE J. MAYER,
Plaintiff
vs,
FRANK PETZELT,
Defendant
No. 58 C 1109

ORDER.

This cause having come on to be heard for a ruling on the Motion of Frank Petzelt, Defendant, for judgment notwithstanding the general verdict and in conformity with the response of the jury to the special interrogatory, or in the alternative for judgment of a directed verdict in favor of Defendant under Rule 50(b) of the Rules of Civil Procedure for United States District Courts, or in the alternative for a new trial, the Court having read the Motion and having read and considered Briefs filed in support of and in opposition to said Motion, and the Court, under the Rules of Civil Procedure above mentioned, having reserved its ruling on the Motions for a Directed Verdict made by and on behalf of the Defendant at the close of all the evidence introduced by the Plaintiff and again at the close of all of the evidence in the case, and finding that it has jurisdiction of the parties and of the subject matter,

It Is Hereby Ordered And Adjudged that the Motion of Defendant, Frank Petzelt, for judgment under Rule 50(b)

of the Rules of Civil Procedure for United States District Courts be, and it is hereby sustained.

It Is Further Ordered And Adjudged that Defendant, Frank Petzelt, have judgment in his favor under Rule 50(b) of the Rules of Civil Procedure for United States District Courts, notwithstanding the general verdict of the jury, and that Plaintiff take nothing by his suit and that Defendant, Frank Petzelt, go hence without day and have judgment for his costs against Plaintiff, Theodore J. Mayer.

Enter: /s/ J. M. Miner
Judge

Dated: October 30, 1961

CONSTITUTIONAL PROVISIONS AND STATUTES CITED.

Constitution of the United States, Seventh Amendment—

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by the jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Federal Rules of Civil Procedure, Rule 50(b), 28 U.S.C.—

> "(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the al-

ternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Federal Rules of Civil Procedure, Adopted Amendments, Rule 50 (b), (c), and (d)—

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was

returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

"(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict."

"(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the

party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

Title 28 U.S.C. Sec. 1254(1)—

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1). By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Title 28 U.S.C. Sec. 1652—

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."